# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1942

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No. 220

TRINITY CORPORATION, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 23–32) are reported in 44 B. T. A. 1219. The opinion of the circuit court of appeals (R. 100–102) is reported in 127 F. (2d) 604.

### JURISDICTION

The judgment of the circuit court of appeals was entered on April 21, 1942. (R. 102.) The petition for a writ of certiorari was filed on July 10, 1942. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether the value of the taxpayer's shares received on the exchange of its real property for other real estate, cash and shares of its own capital stock, should be included in determining gain or loss on the transaction under Sections 22 (a) and 111 (b) of the Revenue Act of 1936.

2. Whether the Board of Tax Appeals erred in sustaining the Commissioner's determination of the fair market value of the stock.

### STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations are set out in the Appendix, *infra,* pp. 9–10.

### STATEMENT

Taxpayer is a Texas corporation having a capital of 5,000 shares of no-par stock. In 1937 its principal assets were the Trinity Building, a 16-story office building, and a ten year lease, renewable for ten year periods until 1987, of the premises on which the building was situate. At that time Commercial Standard Insurance Company owned all taxpayer's capital stock. (R. 23.)

In 1937 Commercial acquired the Trinity Building and the lease of the premises from taxpayer in order to meet the requirement of the state insurance examiners. In exchange taxpayer received

$60,000 cash, other real estate and 2,920 shares of its own capital stock. (R. 23–24.) At the same time taxpayer agreed to transfer 3,000 shares of its own capital stock to Commercial in the event that it failed to renew the ground lease, and to secure this obligation taxpayer delivered certificates representing 3,000 shares to Commercial, retaining all the dividends, benefits and voting privileges pertaining to the stock (R. 24–25).

The Board of Tax Appeals found as a fact that at the time of the exchange the 2,920 shares of taxpayer's capital stock had a fair market value of $214,168.54 or $73.34539 a share (R. 26). The Board had before it in addition to the last mentioned agreement the following data upon the question of value: In 1935 Commercial had purchased the shares for $125 per share (R. 23), In 1938 Commercial purchased 320 shares at their book value of $73.34539 each (R. 25). Commercial also declared in a report to the Treasury for the period ending December 31, 1937, that the stock had a fair market value of $125 per share (R. 25). As of January 1, 1938, the Trinity Building had a depreciated cost of slightly over $600,000 (R. 24) and was appraised at a present worth of about $730,000 (R. 32); it was encumbered by a $260,000 mortgage (R. 24). The building which it received in exchange had a depreciation cost of $263,636.16 and was encumbered by a mortgage of $150,000 (R. 24). There also is evidence that taxpayer had had no

earnings for some time and, basing their testimony primarily upon that fact, two witnesses testified as experts that the stock had no market value (R. 30–31). The Board gave no weight to their opinion (R. 31).

The Board of Tax Appeals decided that the Commissioner had not erred in determining that taxpayer realized a taxable gain upon the sale of the Trinity Building, counting the shares at a fair market value of $214,168.54 as part of the consideration received (R. 26). On appeal the circuit court of appeals affirmed (R. 102).

**ARGUMENT**

1. This Court has recognized expressly that the definition of gross income in Section 22 (a) is "so general in its terms as to render an interpretative regulation appropriate" to deal with the question whether a corporation realizes income upon its transactions in shares of its own capital stock. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114. The Treasury has promulgated such a regulation. The substance of Article 22 (a)–16 of Regulations 86, was first promulgated on May 2, 1934 as Treasury Decision 4430, XIII–1 Cum. Bull. 36. It provides—

> * * * if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in shares of another. So also if the corporation receives

> its own stock as consideration upon the sale of property by it * * * the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. * * *

In the *Reynolds* case last cited it was held that the first sentence of this interpretative regulation, although appropriate, could not be applied retroactively to years in which a contrary rule was in force.[1] But here application of the regulation is not invalid under that decision. The transaction giving rise to the tax occurred in 1937, three years after the regulation was adopted. And, it is settled that the regulations may be changed and applied prospectively notwithstanding any difference in the prior rule. *Helvering* v. *Wilshire Oil Company,* 308 U. S. 90; *Helvering* v. *Reynolds,* 313 U. S. 428; *White* v. *Winchester Country Club,* 315 U. S. 32. See *Allen* v. *National Manufacture & Stores Corp.,* 125 F. (2d) 239 (C. C. A. 5th), certiorari denied, May 4, 1942, No. 1091, October Term, 1941, and *Commissioner* v. *Air Reduction Co.* (C. C. A. 2d), decided July 16, 1942, dealing specifically with this regulation.

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[1] Treasury Regulations 74, promulgated under the Revenue Act of 1928 had provided:

"ART. 66. * * * If * * * the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A corporation realizes no gain or loss from the purchase or sale of its own stock."

As applied to the present case, moreover, the change in the regulations does not reverse the earlier practice. The present case involves an exchange of property for stock and, unlike the *Reynolds Co.* case (306 U. S. 110) not the purchase and sale of stock. Even under the regulations in effect prior to 1934 the exchange of property for stock was a taxable transaction. *Commissioner* v. *S. A. Woods Mach. Co.*, 57 F. (2d) 635 (C. C. A. 1st), certiorari denied, 287 U. S. 613; *Commissioner* v. *Boca Ceiga Development Co.*, 66 F. (2d) 1004 (C. C. A. 3d); *Dorsey Co.* v. *Commissioner*, 76 F. (2d) 339 (C. C. A. 5th), certiorari denied, 296 U. S. 589; *Allyne-Zerk Co.* v. *Commissioner*, 83 F. (2d) 525 (C. C. A. 6th); cf. *Hammond Iron Co.* v. *Commissioner*, 122 F. (2d) 4 (C. C. A. 5th).

The peculiar circumstance that in the instant case the stock was acquired from the sole stockholder does not render the regulation inapplicable. Consistently with the theory that a corporation is a separate entity and the stock a transferable property, the regulation makes no distinction between corporations with one stockholder and those with many.

2. There is also no occasion for further review of that portion of the decision below which sustained the Board's determination of the fair market value of the stock. The question was one of fact on which the finding of the Board was final if supported by substantial evidence. *Elmhurst*

*Cemetery Co.* v. *Commissioner,* 300 U. S. 37; *Helvering* v. *Kehoe,* 309 U. S. 277, 279; *Wilmington Trust Co.* v. *Helvering,* No. 775, October Term, 1941, decided April 27, 1942. The evidence of book values and of other sales as well as the appraisal of the assets sufficiently supports the findings of the Board. See pp. 3–4, *supra.*

There is no conflict between the decision below and *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481. In that case the Court did not lay down any rule that stock, the sale of which was restricted, could have no market value. That circumstance was but one among many which led the Court to hold the Board's finding to be unwarranted; equally important was the speculative character of the venture of drilling in oil fields proven to be spotty and found later to be worthless. In the instant case the beneficial ownership was transferable subject solely to the rights of Commercial to the stock if the lease were not renewed; the pledge did not, as taxpayer argues, take all "exchangeable value" from the shares. And obviously the mere fact that there had been operating losses did not make the stock too speculative for valuation. *Propper* v. *Commissioner,* 89 F. (2d) 617 (C. C. A. 2d) and *Schuh Trading Co.* v. *Commissioner,* 95 F. (2d) 404 (C. C. A. 7th) are distinguishable on their facts for like reasons. In *Heiner* v. *Gwinner,* 114 F. (2d) 723 (C. C. A. 3d), certiorari was sought on the basis of a claim of conflict with the *Tex Penn*

and *Schuh* cases similar to the claim made here but the writ was denied, *Gwinner* v. *Heiner,* 311 U. S. 714.

### CONCLUSION

The decision below was correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 1942.